STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

JM POLYMERS, LLC, a Michigan limited liability company,

Plaintiff,

vs. Case No. 2013-3899-CK

SPARTAN POLYMERS, LLC, a Michigan limited liability company and MICHAEL A. KIRTLEY,

Defendants.

_____/

OPINION AND ORDER

Defendants have filed a motion for summary disposition in lieu of filing an answer. Plaintiff has filed a response and requests that the motion be denied and that partial summary disposition be entered in its favor.

In addition, Plaintiff has filed a second motion for partial summary disposition. Defendants have filed a response to the motion and request that it be denied.

Facts and Procedural Background

Defendant Spartan Polymers, LLC ("Defendant Spartan") is a company owned and operated by Defendant Michael A. Kirtley ("Defendant Kirtley"). Defendant Spartan is a manufacturer's sales representative in the plastic and resin industry. On or around September 30, 2004, Plaintiff entered into a manufacturer's representative agreement with Defendant Spartan whereby Defendant Spartan agreed to act as Plaintiff's exclusive sales representative for 27 specific customer accounts (the "Agreement"). According to Plaintiff, Defendants have since repeatedly breached the Agreement.

On September 27, 2013 Plaintiff filed its verified complaint and motion for a temporary restraining order. In its complaint, Plaintiff asserts claims against Defendants for: Count I- Breach of Contract, Count II- Breach of Fiduciary Duty, Count III- Tortious Interference with Contractual and Business Relations, Count IV- Violation of Michigan Uniform Trade Secrets Act (MUTSA), Count V- Attorneys' Fees as Authorized under the Michigan Uniform Trade Secrets Act, and Count VI- Civil Conspiracy.

On September 27, 2013, the Court entered a temporary restraining order ("TRO"). On October 3, 2013, Defendants filed a motion to dissolve the TRO. On October 7, 2013, the Court granted Defendants' motion to dissolve the TRO and set a date for an evidentiary hearing in connection with Plaintiff's motion for a preliminary injunction. On October 17th and 28th 2013, the Court held an evidentiary hearing in connection with the motion for preliminary injunction.

On November 12, 2013, Defendants filed their motion for summary disposition in lieu of filing an answer. On November 26, 2013, Plaintiff filed its response and cross motion for summary disposition.

On December 2, 2013, the Court granted Plaintiff's motion for a preliminary injunction. On December 11, 2013, Defendants filed their reply in response to Plaintiff's response to their motion for summary disposition and motion for partial summary disposition. On December 16, 2013, the Court held a hearing in connection with the parties' first motions for summary disposition. At the conclusion of the hearing, the Court took the motions under advisement.

On January 14, 2014, Defendants filed their second summary disposition motion. On January 21, 2014, Plaintiff filed its response to the motion and motion for partial summary disposition in its favor. On February 3, 2014, the Court held a hearing in connection with the second set of summary disposition motions and took the matters under advisement.

The Court has reviewed the pleadings submitted by the parties, as well as the arguments made at the hearings, and is now prepared to render its decision.

Standard of Review

MCR 2.116(C)(7) permits summary disposition where the claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action. In reviewing a motion under MCR 2.116(C)(7), the Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The Court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists. *Id.* Where a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Kent v Alpine Valley Ski Area, Inc*, 240 Mich App 731, 736; 613 NW2d 383 (2000). Where no material facts are in dispute, whether the claim is barred is a question of law. *Id*

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C)(10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

Arguments and Analysis

1) The Parties' First Motions For Summary Disposition

A. Breach of Contract

In support of their motion, Defendants first contend that Defendant Kirtley was not a party to the Agreement and therefore cannot be held liable under a breach of contract theory. To prove breach of contract, the plaintiff must first prove the existence of a contract between the parties. *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990). In this case, Defendant Kirtley is not a party to the Agreement, and Plaintiff has not provided a copy of any contract to which Defendant Kirtley is a party. Accordingly, Plaintiff has failed to properly plead a breach of contract claim against Defendant Kirtley. Consequently, Plaintiff's breach of contract claims against Defendant Kirtley must be dismissed.

The next issue before the Court is whether Defendant Spartan terminated the Agreement in 2008. Section 6 of the Agreement provides:

> A. This agreement, upon execution by both parties, will continue in effect for a period of three (3) years from the date first above-written. This Agreement shall thereafter continue in effect for additional one year periods until canceled by either party on ninety (90) days written notice in advance of renewal of the agreement.
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> B. If this Agreement is terminated for any reason by [Defendant Spartan], [Defendant Spartan] agrees to give ninety (90) days prior notice to [Plaintiff]. [Plaintiff agrees to pay the stipulated sales commission up to the last effective day of representation. If this Agreement is terminated by [Plaintiff], [Plaintiff agrees to pay full commissions for the life of production of all jobs then in production for as long as [Plaintiff] retains the business. For jobs sold but not yet in production, the commission will commence if and when production

> commences on a regular production basis and will continue for life of the production of that job for as long as [Plaintiff] retains the business.

Further, Section 12 of the Agreement governs the manner in which notice must be provided. Specifically, Section 12 provides:

> All notices which are required to be given by either party under the terms of this Agreement shall be in writing *and sent pre-paid by registered mail* or by telegram followed by registered mail to the address indicated in Appendix B or the last known address if different than above.

Defendants contend that they sent a termination notice ("Notice") in 2008, but concede that the Notice was not sent by registered mail. Moreover, Defendants have failed to cite to any authority that would allow them to terminate their contractual relationship in a manner other than by complying with the procedure set forth in the Agreement. Accordingly, the Court is convinced that Defendants did not terminate the Agreement in 2008.

Further, Defendants do not appear to dispute that Defendant Spartan is a direct competitor to Plaintiff. Plaintiff has presented evidence that Defendant Spartan's largest client is one of the accounts that it has with Plaintiff, that Defendant Spartan, through Defendant Kirtley, has been selling some of Plaintiff's other competitors' products, and obtaining supplies from one of Plaintiff's suppliers. (*See* Exhibit A to Plaintiff's response to Defendants' motion to dissolve the TRO; Plaintiff's Exhibit B to its Evidentiary Hearing Summary.) Plaintiff asserts that because the Agreement has remained in full force and effect at all times at issue in this case, Defendants' actions violate sections 5 and 11 of the Agreement. Those sections provide, in pertinent part:

> 5. At the accounts listed in Appendix A, [Defendant Spartan] agrees not to act as a manufacturer's representative and/or distributor for any third party which manufactures or distributes plastic materials which in the opinion of [Plaintiff] is competitive with Products distributed by [Plaintiff].
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> 11. [Plaintiff] has retained [Defendant Spartan] only for the purposes set forth in this Agreement, his relationship to [Plaintiff] is that of an independent contractor. During the term hereof, [Defendant Spartan] shall not, directly or indirectly, enter into, or in any manner take part in, any business, profession or other endeavor which directly competes with [Plaintiff] in the sale of their plastic material lines during the term of this Agreement. [Defendant Spartan] shall not compete whether as an employee, agent, independent contractor, owner or otherwise.

At a minimum, the above-referenced provisions bar Defendant Spartan acting as a manufacturer rep to any of the accounts listed in Appendix A of the Agreement. One of those accounts is Creative Techniques. During his deposition, Defendant Kirtley admitted that Defendant Spartan's largest account is Creative Techniques. Accordingly, the Court is satisfied that Plaintiff is entitled to summary disposition of its breach of contract claim against Defendant Spartan as Defendant Kirtley has conceded that Defendant Spartan has, through his actions, been engaged in business with at least one of the entities listed in Appendix A of the Agreement.

B. Breach of Fiduciary Duty

In support of their motion, Defendants contend that they did not owe a fiduciary duty to Plaintiff because Defendant Spartan's authority was limited by the Agreement. Specifically, the Agreement provides, in pertinent part: "[Defendant Spartan] agrees that [Defendant Spartan] shall have no power directly or indirectly, to make any commitment that shall be biding upon [Plaintiff]." (Agreement, ¶4, p. 2). In response, Plaintiff contends that the fact that Defendant Spartan's authority was limited does not change that it was an agent. Indeed, the Michigan Court of Appeals has recognized that a principal may limit an agent's authority. See *Fifth Third Mortgage-MI, LLC v Hance*, unpublished per curium opinion of the Court of Appeals, decided September 29, 2011, (Docket Numbers 294633, 294698) (Contract barring agent from incurring obligations, contractual or otherwise, on behalf of the principal, or to execute any agreement on behalf of the principal); *Asposito v Security Ben Ass n*, 258 Mich 507, 513; 2243 NW 37 (1932)

("The company, like any other principal, could limit the authority of its agents…"). Based on the above-referenced case law, the Court is convinced that the limitation of Defendant Spartan's authority did not change the fact that it was acting as Plaintiff's agent.

Defendants next contend that Defendant Spartan did not owe Plaintiff a fiduciary duty because it was an independent contractor. A fiduciary duty arises where there is a fiduciary relationship between the parties. Familiar examples are: trustees to beneficiaries, guardians to wards, attorney to clients, and doctors to patients. *Portage Aluminum Co v Kentwood National Bank,* 106 Mich App 290, 294; 307 NW2d 761 (1981). Generally, whether a fiduciary relation exists is a question of fact. *Fassihi v Sommers, Schwartz, Silver, Etc,* 107 Mich App 509, 515; 309 NW2d 645 (1981). A person in a fiduciary relation to another is under a duty to act for the benefit of the other as to matters within the scope of the relation. See, 1 Restatement, Trusts, 2d, § 2, Comment b, p 6; *Melynchenko v Clay,* 152 Mich App 193, 197; 393 NW2d 589 (1986). Generally, Michigan courts have been reluctant to extend the cause of action for breach of fiduciary relationship beyond the traditional context. See *Teadt v St John Evangelical Lutheran Church,* 237 Mich App 567, 581; 603 NW2d 816 (2000) (no fiduciary duty where interpersonal relationships are involved); *Farm Credit Services of Michigan's Heartland, PCA v Weldon,* 232 Mich App 662, 680; 591 NW2d 438 (1998), cert den 529 U.S. 1021; 120 S Ct 1425; 146 L Ed 2d 316 (2000) (fiduciary relationship does not generally arise in the bank lender relationship).

In support of their position, Defendant Spartan relies on *Horizon Painting, Inc v Adams*, unpublished per curium opinion of the Court of Appeals, decided February 27, 2007, (Docket Numbers 265789, 266717). In *Horizon*, the Court held that defendant, an independent contractor hired to assist in securing loans for the principal, did not owe a fiduciary duty to the principal,

relying on the Michigan Courts' reluctance to extend the breach of fiduciary duty cause of action beyond the traditional context.

The Court finds the reasoning in *Horizon* to be persuasive. As in that case, Defendant Spartan was an independent contractor hired to perform specific tasks, i.e. obtain business with the 27 customers listed on Appendix A to the Agreement on behalf of Plaintiff. Moreover, Plaintiff has failed to cite any authority supporting the proposition that a fiduciary relationship exists between parties to contractual agreements as in this case. Consequently, the Court is satisfied that the Agreement did not give rise to a fiduciary relationship. Accordingly, Defendants' motion for summary disposition of Plaintiff's breach of fiduciary duty claims must be granted.

C. Tortious Interference with Contractual or Business Relations

The requisite elements for tortious interference with a contract or business expectancy are: (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectation of the relationship by the interferer, (3) an intentional interference causing termination of the relationship or expectation, and (4) resulting in damages to the complaining party. *Badiee v Brighton Area Schools*, 265 Mich App 343, 365-366; 695 NW2d 521 (2005); *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 255; 673 NW2d 805 (2003). One who alleges tortious interference must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law. *Baidee, supra* at 367; *CMI Int'l, Inc v Intermet Int'l, Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002). "A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances." *Baidee, supra*, quoting *Prysak v RL Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992). "If the defendant's conduct was not wrongful per se, the plaintiff must

demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference." *Baidee, supra,* quoting *CMI Int'l, supra* at 131. If the interferer's actions were motivated by legitimate business reasons, its actions would not establish improper motive or interference. *Baidee, supra* at 366. Business expectancy must be a reasonable likelihood, more than mere wishful thinking. *Trepel v Pontiac Osteopathic Hospital*, 135 Mich App 361, 377; 354 NW2d 341 (1984).

In its complaint, Plaintiff alleges that it possessed a valid business relationship/expectancy with the 27 entities listed in Appendix A of the Agreement (element 1), that Defendants were aware of its business relationship with those entities given that Defendant Spartan was hired to sell them products on behalf of Plaintiff (element 2), that Defendants intentionally and improperly interfered with the business relationship between Plaintiff and the entities by competing with Plaintiff in violation of Defendant Spartan's duties under the Agreement(element 3), and that due to Defendants' actions it suffered lost sales and expected profits (element 4). However, given the early stage of this case, the Court is convinced that genuine issues exist which preclude it from addressing the merits of the claim. First, the extent of Defendants contact with the 27 entities at issue is unknown at this time, as is the validity of Plaintiff's expectancy to establish business relationships with those entities. Second, the issue as to Defendants' intent is a question of fact as Defendant Kirtley has maintained that he believed the Agreement was terminated at the time he began contacting the entities at issue on behalf of Defendant Spartan. Given these issues, *inter alia*, the Court is satisfied that any further examination of Plaintiff's tortious interference claim is premature at this time.

D. Violation of Michigan Uniform Trade Secrets Act

Plaintiff also alleges that Defendants' actions have violated the Michigan Uniform Trade Secrets Act ("MUTSA"). In their motion, Defendants assert that Plaintiff has failed to specify the trade secret(s) at issue with sufficient particularity. However, a plaintiff is not required to plead trade secrets with particularity at this early stage of litigation. *Interactive Solutions Group, Inc v Autozone Parts, Inc*, unpublished opinion and order of the United States District Court, Eastern District of Michigan, issued April 16, 2012 (Docket No. 11-13182). Moreover, Plaintiff has identified a number of categories of alleged trade secrets that Defendants have misappropriated. (Complaint, at ¶11.) After reviewing the complaint, the Court is satisfied that Plaintiff has adequately identified the alleged trade secrets at issue at this stage in the case.

With respect to the misappropriation element, the Court is convinced that given the early stage of this matter, with discovery ongoing, any consideration of this issue is premature at this time. For these reasons, Defendants' motion for summary disposition of Plaintiff's trade secret claim is denied without prejudice.

E. Civil Conspiracy

Plaintiff also alleges that Defendants engaged in civil conspiracy to tortiously interfere with its contractual and business relationships/expectancies. However, it appears undisputed that Defendant Kirtley was at all pertinent times acting as an agent for Defendant Spartan. An agent acting solely in the capacity as an agent cannot conspire with the principal while engaged in the principal's business. *Mercure v Van Buren Township*, 81 F Supp 2d 814, 833 (ED Mich 2000); *First Pub Corp v Parfet*, 246 Mich App 182, 193; 631 NW2d 785(2001), aff'd in part, vacated in part on other grounds, 468 Mich 101; 658 NW2d 477 (2003). Under this authority, the Court is satisfied that Defendant Kirtley could not have conspired with Defendant Spartan. Accordingly, Defendants are entitled to summary disposition of Plaintiff's civil conspiracy claims.

2) The Parties' Second Motions for Partial Summary Disposition

The parties' second motions seek a determination as to when Defendant Spartan's December 13, 2013 termination notice will become effective. Plaintiff contends that under Section 6 of the Agreement the termination does not become effective until September 30, 2014. Defendants contend that the termination becomes effective 90 days after it was given, which in this case is March 3, 2014.

Section 6 of the Agreement provides:

> A. This agreement, upon execution by both parties, will continue in effect for a period of three (3) years from the date first above-written. This Agreement shall thereafter continue in effect for additional one year periods until canceled by either party on ninety (90) days written notice in advance of renewal of the agreement.
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> B. If this Agreement is terminated for any reason by [Defendant Spartan], [Defendant Spartan] agrees to give ninety (90) days prior notice to [Plaintiff]. [Plaintiff agrees to pay the stipulated sales commission up to the last effective day of representation. If this Agreement is terminated by [Plaintiff], [Plaintiff agrees to pay full commissions for the life of production of all jobs then in production for as long as [Plaintiff] retains the business. For jobs sold but not yet in production, the commission will commence if and when production commences on a regular production basis and will continue for life of the production of that job for as long as [Plaintiff] retains the business.

Relying on subsection (A), Plaintiff contends that the Agreement renewed on September 30, 2013 for an additional 1 year term and remains in effect, regardless of the termination, until September 30, 2014. In response, Defendants contend that subsection (A) addressed the manner in which the Agreement can be cancelled, or automatically renewed, whereas subsection (B) addresses termination of the Agreement. Accordingly, Defendants contend that because they terminated, rather than cancelled, the Agreement, subsection (B) applies, and that under subsection (B) the termination becomes effective 90 days after the termination notice is given.

The primary goal in contract interpretation is to ascertain and effectuate the intent of the parties. *Old Kent Bank v Sobczak,* 243 Mich App 57, 63; 620 NW2d 663 (2000). A court reads the agreement as a whole and attempts to apply the plain language of the contract itself to enforce the parties' intent. *Id.* "If the contractual language is unambiguous, courts must interpret and enforce the contract as written because an unambiguous contract reflects the parties' intent as a matter of law." *Phillips v Homer,* 480 Mich. 19, 24; 745 NW2d 754 (2008). If, however, the contractual language is ambiguous, it presents a question of fact to be decided by a jury. *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 638; 734 NW 2d 217 (2007).

In support of their position, Defendants rely on *Holtzman Interests 23, LLC v FFC Sugarloaf, LLC*, unpublished per curium opinion of the Court of Appeals, decided February 14, 2012, (Docket Numbers 298430). In *Holtzman*, the parties executed a management agreement. One section of the management agreement provided that the agreement would automatically renew for successive one year terms unless either party gives the other party written notice of its intent not to renew at least 60 days prior to the end of the previous one year term. Another part of the management agreement allows for termination of the agreement at any time upon 90 days written notice. In holding that the provisions constituted two separate and distinct ways to end the relationship, the Court held "if expiration were truly synonymous with termination, the word expiration in §21.5(a) would have no meaning and would amount to mere surplusage."

The Court is persuaded by the reasoning set forth in *Holtzman*. As in that case, the Agreement contains two separate subsections, one referencing cancellation and the other referencing termination. Moreover, as in *Holtzman*, the provisions in this case contain different results if invoked. Subsection (A) authorizes either party to cancel the Agreement, but does not provide for the payment of commissions beyond the effective date of cancelation. Subsection (B)

allows either party to terminate the Agreement and provides for the payment of commissions in different ways depending on which party terminates the Agreement. Moreover, if the Court were to find otherwise, it would render the first portion of subsection (B) redundant. If subsection (A) were the only manner by which to bring the Agreement to an end there would be no reason to state that the Agreement could be terminated for any reason upon 90 days notice in subsection (B). The Court is convinced that concluding that the subsections provide different ways of ending the Agreement is the conclusion which gives effect to every word, clause and phrase. Accordingly, the Court holds that Defendants' December 13, 2013 notice of termination was provided pursuant to subsection (B) and that the termination will become effective 90 thereafter.

Conclusion

For the reasons set forth above, Defendants' November 12, 2013 motion for summary disposition is GRANTED, IN PART and DENIED, IN PART. Further, Plaintiff's November 26, 2013 cross-motion for summary disposition is GRANTED, IN PART and DENIED, IN PART. Specifically:

- Defendants' motion is GRANTED to the extent that they seek summary disposition of Plaintiff's breach of contract claims as to Defendant Spartan. Defendants' motion is DENIED with respect to Plaintiff's breach of contract claims as to Defendant Kirtley. Further, Plaintiff is GRANTED summary disposition of its breach of contract claims as to Defendant Kirtley;

- Defendants' motion for summary disposition of Plaintiff's breach of fiduciary duty claims is GRANTED;

- The parties' motions for summary disposition of Plaintiff's tortious interference claims are DENIED WITHOUT PREJUDICE to the extent they are brought pursuant to MCR 2.116(C)(10). Defendant's motion is DENIED to the extent it is brought pursuant to MCR 2.116(C)(7) and/or (8).

- Defendants' motion for summary disposition of Plaintiff's civil conspiracy claims is GRANTED; and

- The parties' motions for summary disposition of Plaintiff's Michigan Uniform Trade Secrets Act are DENIED WITHOUT PREJUDICE. Defendant's motion is DENIED to the extent it is brought pursuant to MCR 2.116(C)(7) and/or (8).

With respect to the parties' second motions for partial summary disposition, for the reasons discussed above, Defendants' motion is GRANTED and Plaintiff's motion is DENIED. Specifically, the Court finds that the Agreement was terminated with an effective date of March 3, 2014. Pursuant to MCR 2.602(A)(3), this Opinion and Order neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: February 18, 2014

JCF/sr

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